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86 - No. 12

In The
Supreme Court of the United States
October Term, 1986

DANIEL ERWIN DAVIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

JOSEPH SAINT-VELTRI
JERALYN E. MERRITT
1570 Emerson Street
Denver, Colorado 80218
(303) 832-6777

Attorneys for Petitioner Davis

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

QUESTION PRESENTED

Whether multiple punishment resulting from the appellant's pleas of guilty to three criminal counts constitutes impermissibly cumulative punishment in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and principles emanating from that clause.

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DANIEL ERWIN DAVIS,

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THE UNITED STATES OF AMERICA,

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ON PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

Daniel Erwin Davis respectfully prays that a Writ of Certiorari be issued to review the judgment of the Tenth Circuit Court of Appeals entered in the above-entitled cause on June 9, 1986.

—o—

OPINION BELOW

This cause was decided by a panel of the United States Court of Appeals for the Tenth Circuit on June 9,

1986, in an opinion which has been designated for routine publication. The opinion is reproduced as Appendix "A" hereto.

———o———

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 9, 1986.

The jurisdiction of this Court is envoked under Title 28, United States Code, Section 1254.

———o———

QUESTION PRESENTED

Whether multiple punishment resulting from the appellant's pleas of guilty to three criminal counts constitutes impermissibly cumulative punishment in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and principles emanating from that clause.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution in pertinent part provides:

> ". . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

STATEMENT OF THE CASE

On May 10, 1985, a Federal Grand Jury in the District of Colorado returned a nine-count Indictment against Petitioner. On July 8, 1985, Petitioner was indicted on a Superceding Indictment charging eight counts.

Pursuant to a plea agreement, Petitioner entered pleas of guilty to the following three criminal counts:

18 U.S.C. § 371—CONSPIRACY;

26 U.S.C. § 7201—WILLFUL ATTEMPT TO EVADE AND DEFEAT;

21 U.S.C. § 843(b)—USE OF A COMMUNICATIONS FACILITY (TELEPHONE).

The Title 18 and Title 26 offenses were contained in an Amended Information. The Title 21 offense was a count in the Superceding Indictment.

On September 24, 1985, the Court imposed the following sentences in the following order as to each of the criminal counts:

(a) Count Two of the Superceding Indictment, 21 U.S.C. § 843(b), USE OF A COMMUNICATION FACILITY (TELEPHONE)—a term of confinement of four years and a fine of $10,000.00.

(b) Count Two of the Amended Criminal Information, 21 U.S.C. § 7201, WILLFUL ATTEMPT TO EVADE AND DEFEAT—a term of confinement of four years, six months, and a fine of $10,000.00 to run consecutively with the four year sentence imposed on Count Two of the Indictment.

(c) Count One of the Amended Criminal Information, 18 U.S.C. § 371, CONSPIRACY—a term of confinement of five years, suspended, probation for a period of five years, the probation to be consecutive to the sentences imposed on the other criminal counts, including any parole or supervision time.

The Appellant is currently serving his term of confinement.

———o———

REASONS FOR GRANTING THE WRIT

The Petitioner, Daniel E. Davis, contends that the multiple punishment consisting of three separate consecutive sentences imposed by the trial court upon his pleas of guilty to two counts of a Criminal Information and a single count of a Criminal Indictment constitute impermissible cumulative punishment in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and principles emanating from that clause.

The principal argument of the Defendant is that the conspiracy, as presented by the Government, together with the prosecutor's statement on each of the counts, created a *de facto* comprehensive crime into which the other counts merged, since they were either objects of the conspiracy or means by which the conspiracy was committed.[1] Thus, the other counts became the functional equivalent of lesser

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[1] Copies of the Amended Information and the Prosecutor's Statement are attached hereto and incorporated herein by reference as Appendix "B" and "C" respectively.

included offenses, especially since each of them have the texture of a subsumed conspiracy.

The telephone count (21 U.S.C. § 843(b)) obviously requires the activity of two people (speakers over the interstate communications facility). The use of the telephone was described as a means of committing the distribution of cocaine in the conspiracy count. Since the telephone count involved two people with some type of agreement, it was an inchoate conspiracy type offense. The Title 26 offense (evasion), as drafted and presented by the government, also describes a conspiracy since the unreported income was generated by the illicit activity described in the conspiracy count, and involved numerous other individuals over the same periods of time as indicated in the conspiracy. See *United States v. Brantley*, 733 F.2d 1429, 1436-37 (Cir. 11, 1984), and *United States v. Mourid*, 729 F.2d 195, 202-03 (Cir. 2, 1984).

Since the Defendant did not plead guilty to a Title 21 conspiracy or a Title 21 distribution count (the Government having foregone those counts), the Court of Appeals' reliance upon *Albernaz v. United States*, 450 U.S. 333 (1981) is misplaced. *Albernaz* held that Congress, in the passage of the Controlled Substance Act of 1970, *intended* to permit courts to impose multiple punishment for violation of *separate Title 21 offenses*, such as Conspiracy to Import and Conspiracy to Possess with Intent to Distribute. The intent of Congress relative to any one of the three counts to which this Defendant plead guilty is inscrutible. The ultimate question of whether two offenses are the same for purposes of double jeopardy is one of legislative intent. See *Garrett v. United States*, — U.S.

—, 105 S.Ct. 2407 (1985). In the absence of legislative intent, as with the three counts to which this Defendant plead guilty, lenity should apply. *Ball v. United States,* — U.S. —, 105 S.Ct. 1668 (1985).

The Double Jeopardy Clause protects against multiple punishments for the same offense. *North Carolina v. Pierce,* 395 U.S. 711 (1969). Whether offenses are precisely the same for purposes of the Double Jeopardy Clause is an analysis inappropriate to this particular case, since the configuration of crimes in this case, determined by the language of the counts and the prosecutor's statements, demonstrates an integrated single transaction which is the same offense.

Without a clear indication of legislative intent to permit cumulative punishment for the offenses to which this Defendant plead guilty, it must be presumed that Congress did not intend cumulative punishment. *Whalen v. United States,* 445 U.S. 648, 691-92 (1980).

Petitioner also submits that the within Petition for Writ of Certiorari should be granted in that the decision rendered by the Tenth Circuit Court of Appeals in the instant case is in conflict with decisions of the United States Court of Appeals for the Sixth Circuit on the same matter.

The Sixth Circuit Court of Appeals has consistently held that where the facts and evidence supporting multiple offenses are identical, consecutive sentences are invalid. *United States v. Sutton,* 642 F.2d 1001, 1040 (Cir. 6, 1980) *en banc; United States v. Austin,* 529 F.2d 559, 562-63 (Cir. 6, 1976); *Krench v. United States,* 42 F.2d 354 (Cir. 6, 1930); *Freeman v. United States,* 146 F.2d 978

(Cir. 6 1945). The Tenth Circuit Court of Appeals in its decision in this case expressly rejected the "same transaction" and "totality of the circumstances" test as a substitute for the Blockburger test. (Slip Opinion, p. 7).[2] In adhering to the rigid test under *Blockburger v. United States,* 284 U.S. 299, 304 (1932), the Court is in direct conflict with the Sixth Circuit which holds that convictions for substantive offenses and conspiracy counts merge for the purposes of sentencing when the proofs in the record showing that the Defendant had violated two statutes were identical, and where the substantive and conspiracy counts of an indictment charge essentially the same offense. The Sixth Circuit has clearly adopted the "same evidence" test.

Petitioner submits that had the "same evidence" standard utilized in the Sixth Circuit Court of Appeals been applied to his case, the Court of Appeals would have ordered his convictions merged for the purposes of sentencing, and vacated the multiple sentences imposed upon him.

Petitioner contends that the multiple sentences imposed subsequent to his pleas of guilty are improper and constitutionally impermissible. The unfair "pyramiding" of sentences should have been remedied by the Tenth Circuit Court of Appeals, remanding the case to the trial court with directions to resentence Petitioner to concurrent terms of confinement and probation.

———o———

[2] Moreover, the Court stated specifically, "We reject *Sutton's* reasoning . . . " (Slip Opinion, p. 7).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully Submitted,

JOSEPH SAINT-VELTRI and
JERALYN E. MERRITT

Attorneys for Daniel E. Davis

1570 Emerson Street
Denver, Colorado 80218
(303) 832-6777

APPENDIX "A"

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 85-2473

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL ERWIN DAVIS,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
FOR THE DISTRICT OF COLORADO

(D.C. No. 85-CR-156-1)

(Filed June 9, 1986)

William D. Welch, Assistant United States Attorney (Robert N. Miller, United States Attorney, Denver, Colorado, was also on the brief) for Plaintiff-Appellee

Joseph Saint-Veltri, Denver, Colorado (Jeralyn E. Merritt, Denver, Colorado, was also on the brief) for Defendant-Appellant

Before HOLLOWAY, Chief Judge, LOGAN and SEYMOUR, Circuit Judges

HOLLOWAY, Chief Judge

Defendant-appellant Daniel Erwin Davis pled guilty to three separate criminal counts. On appeal, Davis asserts that the district court violated his rights under the Double Jeopardy Clause by imposing consecutive sen-

tences and presses other arguments challenging those sentences. We affirm.

I

Davis was indicted by a federal grand jury in the District of Colorado on May 10, 1985 on nine counts. I R. 1. On July 8, 1985, Davis was indicted on a superseding indictment charging eight counts. I R. 2. Davis entered into a plea agreement with the United States Attorney whereby he pled guilty to one count of the superseding indictment for violation of 21 U.S.C. § 843(b), unlawful use of a communicatiion facility to facilitate the distribution and possession with intent to distribute a schedule II controlled substance, cocaine. He also pled guilty to two counts of an amended information[1] filed September 3, 1985,[2] charging violation of 18 U.S.C. § 371, conspiracy to distribute cocaine. to defraud the I.R.S. by concealing profits from cocaine trafficking, and to prevent the collection of income tax; and 26 U.S.C. § 7201, attempt to evade or defeat income tax by failing to make an income tax return for 1983, by failing to pay such tax, and by concealing and attempting to conceal his true income. I R. 11.

On July 26, 1985, the district court, after inquiring at length whether Appellant understood that consecutive sen-

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[1] Appellant waived prosecution by indictment and consented to the proceeding by information. I R. 4. We note that the waiver agreed by appellant refers to "21 U.S.C. § 371." However, the parties do not question the fact that the conspiracy charge was alleged under 18 U.S.C. § 371. There being no indication or claim of prejudice, we feel that there is no need to address further this clerical error.

[2] An information filed july 26, 1985, charging violations of 18 U.S.C. § 371 and 26 U.S.C. § 7201 was subsequently amended September 3, 1985.

tences could be imposed, accepted the guilty pleas. The court accepted guilty pleas to the amended information on September 3, 1985, IV R. 10, again inquiring about Appellant's understanding that consecutive sentences could be imposed. IV R. 13. The court then sentenced Appellant as follows:

1) On Count Two of the superseding indictment, 21 U.S.C. § 843(b), use of a communication facility, a term of confinement of four years and a fine of $10,000.

2) On Count Two of the Information, 26 U.S.C. § 7201, willful attempt to evade and defeat, a term of confinement of four years, six months, to run consecutively to the four year sentence imposed on Count Two of the superseding indictment and a fine of $10,000; and

3) On Count One of the criminal information, 18 U.S.C. § 371, conspiracy, a term of confinement of five years, the execution of that sentence being suspended and Appellant being placed on probation for a period of five years, the probation to be consecutive to the sentences imposed on the other criminal counts, including any parole or supervision time.

II

Appellant argues on appeal that the consecutive sentences imposed violate the Double Jeopardy Clause of the Fifth Amendment and Wharton's Rule. Essentially he contends that the conspiracy count, as presented by the Government, together with the prosecutor's statements on the other counts, created one *de facto* comprehensive crime. The substantive counts charging violation of 26 U.S.C. § 7201, attempt to evade tax and 21 U.S.C. § 843

(b), use of a communication facility, merged into the conspiracy count under 18 U.S.C. § 371, as they were objects of the conspiracy or means by which the conspiracy was committed. As charged in the indictment, the similarity of the overt acts of the conspiracy and the substantive counts show that they constituted one offense. Further, the language of the criminal counts shows that "certain of the offenses were either lesser included offenses implicating the doctrine of merger or were the functional equivalent of lesser included offenses." Appellant's Opening Brief at 3.

As an initial matter, we note that the Government has suggested that Appellant waived his double jeopardy claim by his repeated acknowledgments that the sentences imposed could be consecutive. We disagree. In view of this court's recent decision in *United States v. Broce*, 781 F.2d 792 (10th Cir. 1986) (*en banc*), the entry of Appellant's guilty pleas does not bar his double jeopardy claims.

We turn now to the merits of Appellant's contention that his consecutive sentences violate his double jeopardy rights. It is clear that multiple punishment is authorized for violation of separate offenses under Title 21, such as conspiracy to import and conspiracy to possess with intent to distribute. *Albernaz v. United States*, 450 U.S. 333, 339 (1981). Here, however, Appellant pled guilty to only one Title 21 offense, use of a communication facility. The guilty plea to conspiracy was for a violation of Title 18, not Title 21. Appellant therefore argues that the *Albernaz* rationale does not apply here.

Despite this distinction, we are not persuaded by Appellant's arguments. Appellant pled guilty to three sepa-

rate criminal charges. Even if this court should view the charges as concerning one comprehensive criminal episode, it is well settled that a single transaction may be punished under separate statutory provisions if conviction on each charge requires proof of a fact not required for conviction under the other statutory provisions. *Blockburger v. United States,* 284 U.S. 299, 304 (1932); *Timberlake v. United States,* 767 F.2d 1479, 1481 (10th Cir. 1985); *see United States v. Genser,* 710 F.2d 1426, 1429 n.3 (10th Cir. 1983) (noting rejection by this Circuit of the "same transaction" and "totality of the circumstances" test as a substitute for the *Blockburger* test); *United States v. Neal,* 692 F.2d 1296, 1305-06 (10th Cir. 1982).

We find no merit in Appellant's contention that sufficient ambiguity exists so that under the rule of lenity, this court should invalidate the consecutive sentences. "The provisions are unambiguous on their face and each authorizes punishment for a violation of its terms." *Albernaz,* 450 U.S. at 336. The double jeopardy test does not focus on the acts charged in the indictment or the evidence at trial, but rather on the elements of the crimes. *Timberlake,* 767 F.2d at 1486. *United States v. Rodriquez,* 612 F.2d 906, 919 (5th Cir. 1980), *aff'd sub nom., Albernaz v. United States,* 450 U.S. 333 (1981). The *Blockburger* test is satisfied here. The essence of the crime of conspiracy is agreement to commit an unlawful act, *Iannelli v. United States,* 420 U.S. 770, 777 (1975), which element is not involved in the offenses of tax evasion or illegal telephone use. Likewise, use of a telephone to commit or facilitate a drug-related felony is not a required element of a tax evasion offense. The elements required to prove

commission of the three crimes to which Appellant pled guilty are distinct under *Blockburger;* accordingly the consecutive sentences imposed pursuant to each statutory provision do not violate the Double Jeopardy Clause. *Albernaz,* 450 U.S. at 344 and n.3.

We also reject the argument that the substantive counts merge into the conspiracy count under 18 U.S.C. § 371. We find *Iannelli v. United States, supra,* to be controlling. In *Iannelli,* the Court determined that "[h]ad Congress intended to foreclose the possibility of prosecuting conspiracy offenses under § 371 by merging them into prosecutions under § 1955, we think it would have so indicated explicitly." 420 U.S. 789. Likewise, in the instant case the substantive offenses punished by 21 U.S.C. § 843(b), unlawful use of a communication facility to facilitate the distribution and possession with intent to distribute a scheduled II controlled substance, and 26 U.S.C. 7201, attempt to evade and defeat taxes, fail to invoke the concerns which underlie the law of conspiracy. For these same reasons, Appellant's reliance on *Wharton's Rule* is misplaced. *Iannelli,* 420 U.S. at 789-791.

Defendant relies on *United States v. Sutton,* 642 F.2d 1001 (6th Cir. 1980) (*en banc*), in which the Sixth Circuit vacated sentences under 18 U.S.C. § 1962(d) which had been made consecutive to sentences under § 1962(c). The court remanded for imposition of concurrent sentences because "the proofs in this record showing these defendants violated § 1962(c) and § 1962(d) were identical" so that for sentencing purposes the convictions for conspiracy counts under § 1962(d) merged with the substantive counts under § 1962(c). *Id.* at 1040. We reject *Sutton's* reason-

ing because, like other courts that have considered *Sutton* in the context of RICO and have found it unpersuasive, we find *Sutton* inconsistent with *Blockburger* and *Iannelli* here. *See, e.g., United States v. Marrone,* 746 F.2d 957, 959 (3d Cir. 1984); *United States v. Watchmaker,* 761 F.2d 1459, 1477 (11th Cir.), *reh. denied,* 766 F.2d 1493 (11th Cir. 1985), *cert. denied sub nom. Harrell v. United States,* — U.S. —, 106 S.Ct. 879, 880 (1986); *United States v. Hawkins,* 516 F. Supp. 1204, 1206-1208 (M.D. Ga. 1981), *aff'd without opinion,* 671 F.2d 1383 (11th Cir. 1982) (all rejecting *Sutton*). *See also United States v. Bagaric,* 706 F.2d 42, 63 n. 18 (2d Cir.), *cert. denied,* 464 U.S. 840, 917 (1983); *United States v. Rone,* 598 F.2d 564, 570-571 (9th Cir. 1979), *cert. denied sub nom. Little v. United States,* 445 U.S. 946 (1980) (both holding, without citing *Sutton,* the conspiracy counts do not merge into substantive counts under RICO and consecutive sentences were proper).

Likewise we find unpersuasive here the contention that some of the charges were lesser included offenses of others, so that the Double Jeopardy Clause was infringed by the sentences. *See United States v. Neal,* 692 F.2d at 1306.

III

We conclude that Appellant's claims of error are without merit and the judgment and sentences are accordingly

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 85-CR-156

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL E. DAVIS,

Defendant.

AMENDED INFORMATION

18 U.S.C. § 371

26 U.S.C. § 7201

COUNT I

The United States Attorney charges:

That during calendar years 1983 and 1984, and thereafter, in the State and District of Colorado, and elsewhere, DANIEL E. DAVIS, and unindicted co-conspirators Pat Sharkey and Tim Davis, did knowingly and intentionally combine, conspire, confederate and agree together and with certain other persons, both known and unknown, to distribute cocaine, a Schedule II controlled substance; to intentionally defraud the Internal Revenue Service, an agency of the United States, by willfully concealing profits from cocaine trafficking in order to impede the computation of lawful tax thereon, and to prevent the collection of lawful income tax; all in violation of Title 18, United States Code, Section 371.

It was part of said conspiracy that the co-conspirators, including the Defendant, conducted themselves in such a fashion as to avoid detection by law enforcement authorities.

It was further part of said conspiracy that the co-conspirators, including the Defendant, used telephones to contact each other and others for purposes of arranging the distribution of cocaine, as is described in Count II of the criminal Indictment naming him as a Defendant.

It was further part of said conspiracy that the co-conspirators, including the Defendant did conceal the profits derived from cocaine trafficking from the Government in order to prevent the Government from computing and collecting lawful income taxes thereon.

In furtherance of said conspiracy and in order to effect the object thereof, the Defendant and other co-conspirators committed the following overt acts:

OVERT ACTS

1. In the summer of 1983, the Defendant and other co-conspirators received a shipment of cocaine from Tito Vargas of approximately 4 kilograms.

2. Between September of 1983, and December of 1983, the Defendant and other co-conspirators caused the delivery to Gary Gilbert of three pounds of cocaine.

3. Between November, 1983, and January, 1984, Robin Reoh received $121,000.00 from Dan Davis which he then delivered to Tito Vargas as payment for cocaine.

4. Between June, 1983, and December, 1983, the Defendant and other co-conspirators caused the delivery of one kilogram of cocaine to Robert Bushong.

5. From on or about January 1, 1982, up to and including April 18, 1984, Kim Lincoln Henry delivered monies to Dan Davis for payment of cocaine.

6. In September of 1983, Tito Vargas met with Dan Davis in Phoenix, Arizona, and Vargas was paid $117,000.00 and a 1979 Mercedes Benz as partial payment for a previous cocaine transaction.

7. In January of 1984, Dan Davis, Pat Sharkey and Tim Davis were paid $100,000.00 by Robin Reoh for cocaine distributions.

8. On or about January 20, 1984, Robert Bushong met with Dan Davis and Robin Reoh in Tempe, Arizona, where Dan Davis collected approximately $20,000.00 from Bushong from his sales of cocaine.

All in violation of Title 18, United States Code, Section 371.

COUNT II

The United States Attorney charges:

That during the calendar year 1983, DANIEL E. DAVIS received profits in excess of $100,000.00 derived from cocaine trafficking which was taxable income under Title 26, United States Code; that he was required by law to make an income tax return to the Internal Revenue Service on or before April 15, 1984, and to pay such income tax, and that knowing the foregoing facts, DANIEL E. DAVIS, on or about April 15, 1984, in the State and District of Colorado, willfully attempted to evade and defeat

said income tax, which was due and owing by him to the United States of America for calendar year 1983, by failing to make such income tax return to the Internal Revenue Service, by failing to pay such income tax to the Internal Revenue Service, and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct taxable income.

The foregoing was in violation of Title 26, United States Code, Section 7201.

Respectfully submitted,

ROBERT N. MILLER
United States Attorney

By /s/ WILLIAM D. WELCH
Assistant U.S. Attorney

APPENDIX "C"

IN RE:	UNITED STATES V. DANIEL E. DAVIS Criminal Action No. 85-CR-156
STATUTE:	18 U.S.C. § 371 Conspiracy 26 U.S.C. § 7201 Willful Attempt to Evade and Defeat Income Tax
PENALTY:	Count I—NMT 5 Years; $10,000 Count II—NMT 5 years; NMT $100,000 or Both
ATTORNEY:	William D. Welch
PLEA AGREEMENT:	As stated in written plea agreement (copy attached and incorporated herein).

PROSECUTOR'S STATEMENT

With Regard to Count I, the Government's evidence would show:

During 1983 and 1984, Dan Davis, Pat Sharkey, Tim Davis and others including Robin Reoh, Tito Vargas, Robert Roelfson, Bob Bushong, Kim Lincoln Henry, and Gary Gilbert were involved in the trafficking of cocaine in Colorado and other states. Dan Davis and Pat Sharkey obtained cocaine from Tito Vargas, and the other named individuals were distributors for them. In furtherance of the conspiracy, they discussed their cocaine business over the telephone in making arrangements for the purchase and distribution of cocaine.

In the summer of 1983, the Defendant and other co-conspirators received a shipment of cocaine from Tito Vargas of approximately 4 kilograms.

Between September of 1983, and December of 1983, the Defendant and other co-conspirators caused the delivery to Gary Gilbert of three pounds of cocaine.

Between November, 1983, and January, 1984, Robin Reoh received $121,000.00 from Dan Davis which he then delivered to Tito Vargas as payment for cocaine.

Between June, 1983, and December, 1983, the Defendant and other co-conspirators caused the delivery of one kilogram of cocaine to Robert Bushong.

From on or about January 1, 1982, up to and including April 18, 1984, Kim Lincoln Henry delivered monies to Dan Davis for payment of cocaine.

In September of 1983, Tito Vargas met with Dan Davis in Phoenix, Arizona, and Vargas was paid $117,000.00 and a 1979 Mercedes Benz as partial payment for a previous cocaine transaction.

In January of 1984, Dan Davis, Pat Sharkey and Tim Davis were paid $100,000.00 by Robin Reoh for cocaine distributions.

On or about January 20, 1984, Robert Bushong met with Dan Davis and Robin Reoh in Tempe, Arizona, where Dan Davis collected approximately $20,000.00 from Bushong from his sales of cocaine.

COUNT II

The evidence would show that:

During calendar year 1983, Daniel E. Davis was involved with Pat Sharkey, Tim Davis and others in a cocaine distribution organization in the State of Colorado and elsewhere and that Daniel E. Davis made profits in excess of $100,000 from various cocaine transactions. Daniel E. Davis failed to file a 1983 income tax return on April 15, 1984, while he was living in Colorado in an effort to evade and defeat the payment of income tax on said profits.

Supreme Court, U.S.
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No. 86-212 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

DANIEL ERWIN DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-212

DANIEL ERWIN DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims (Pet. 4-7) that the imposition of consecutive sentences, following his guilty plea to a conspiracy charge and two separate substantive offenses, violated the Double Jeopardy Clause of the Fifth Amendment.

1. Petitioner was indicted by a federal grand jury in the District of Colorado on various drug related offenses (Pet. App. 2a). He entered into a plea agreement whereby he pleaded guilty to one count of unlawful use of a communication facility, in violation of 21 U.S.C. 843(b). In addition, he pleaded guilty to two counts of an amended information. The first count charged him with attempted evasion of income tax, in violation of 26 U.S.C. 7201, and the second count charged him with conspiracy to distribute cocaine, to defraud the Internal Revenue Service by concealing profits from cocaine trafficking, and to prevent the collection of

income tax, in violation of 18 U.S.C. 371 (Pet. App. 2a, 8a-lla).

The district court accepted petitioner's guilty pleas after inquiring at length whether he understood that consecutive sentences could be imposed on each of the counts (Pet. App. 2a-3a). The court then sentenced petitioner to four years' imprisonment and a $10,000 fine on the offense of unlawful use of a communication facility; to four and one half years' imprisonment and a $10,000 fine on the income tax evasion charge; and to five years' imprisonment on the conspiracy count, the sentence to be suspended in favor of a five-year term of probation. All sentences were to run consecutively (Pet. App. 3a). Petitioner appealed from the sentence, and the court of appeals affirmed (Pet. App. la-7a).

2. Petitioner argues that the conspiracy count, together with the prosecutor's statements regarding the evidence on the other counts, amounted to one comprehensive crime into which the other counts merged, since they were either objects of the conspiracy or means by which the conspiracy was committed (Pet. 4-5). As the court of appeals correctly held, however, this argument is without merit.

This Court has long held that it is permissible to impose consecutive sentences for substantive offenses and conspiracies to commit those offenses. *Iannelli* v. *United States*, 420 U.S. 770, 777-778 (1975); *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States*, 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit cumulative punishment. In *Albernaz* v. *United States*, 450 U.S. 333 (1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate

where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez*, 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).

Following the same analysis, the court below correctly determined that the *Blockburger* test was satisfied here, as each of the three offenses to which petitioner pleaded guilty contains elements distinct from those of the other offenses. The crime of conspiracy requires proof of an agreement to commit an illegal act, an element not present in either of the substantive offenses. Likewise, the use of a telephone to facilitate a drug-related felony contains entirely different elements from the offense of tax evasion, so the substantive crimes are also distinct. Pet. App. 5a-6a; see also *United States* v. *Ramos*, 666 F.2d 469, 476 (11th Cir. 1982); *United States* v. *Thomas*, 586 F.2d 123, 131 (9th Cir. 1978); *United States* v. *Rodriguez*, 546 F.2d 302 (9th Cir. 1976).

Petitioner's contention (Pet. 5) that *Albernaz* is inapposite because he did not plead guilty to a Title 21 conspiracy is insubstantial. The holding in *Albernaz* was based on well established principles regarding double jeopardy law and cumulative punishments; the analysis used in that case is certainly not limited to the particular offenses at issue there. See Pet. App. 4a-5a.

Petitioner also claims (Pet. 6) that without a clear indication of legislative intent to permit cumulative punishments for the specific offenses involved, it must be presumed that

Congress did not authorize multiple punishments. In fact, however, *Albernaz* holds that the *Blockburger* test is to be controlling unless there is a clear indication of contrary legislative intent. See 450 U.S. at 340. Petitioner points to no such indication of contrary congressional intent in this case.

Finally, citing *United States* v. *Sutton*, 642 F.2d 1001, 1040 (6th Cir. 1980) (en banc), cert. denied, 453 U.S. 912 (1981), petitioner claims (Pet. 6-7) that there is a conflict among the circuits on this issue. In *Sutton*, the court held that because the same evidence at trial supported both the RICO substantive and conspiracy convictions, the convictions merged for purposes of sentencing. As the court of appeals in this case as well as other cases have pointed out, however, the *Sutton* court overlooked the fact that the *Blockburger* test focuses not on the evidence adduced at trial, but on the elements of the crimes charged. Pet. App. 6a-7a; *United States* v. *Watchmaker*, 761 F.2d 1459, 1477 (11th Cir. 1985), cert. denied, No. 85-547 (Jan. 27, 1986); *United States* v. *Marrone*, 746 F.2d 957, 959 (3d Cir. 1984). The *Sutton* case is alone in its interpretation of the RICO statute; the other courts that have considered the issue have uniformly concluded that RICO conspiracy and the substantive offense may be consecutively punished. *United States* v. *Watchmaker, supra*; *United States* v. *Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *Marrone, supra*; *United States* v. *Cagnina*, 697 F.2d 915, 923 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Rone*, 598 F.2d 564, 570-571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

Because the *Sutton* case was decided before this Court's decision in *Albernaz* and before most of the circuit court decisions that have rejected *Sutton's* analysis of the consecutive sentencing issue, we believe that when it again

squarely confronts the issue, the Sixth Circuit is likely to conclude that its previous analysis of this issue was erroneous, and that consecutive sentences are permissible as long as the elements of the two crimes are different, even if the same proof at trial supported both convictions. In any event, the *Sutton* case is limited to the RICO context. Even the Sixth Circuit does not apply the analysis in *Sutton* to ordinary conspiracies such as the one in this case. See *United States* v. *McCullah*, 745 F.2d 350, 355-356 (6th Cir. 1984).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[1]Petitioner's reliance on the Sixth Circuit's pre-*Albernaz* decision in *United States* v. *Austin*, 529 F.2d 559 (1976), is misplaced. The Sixth Circuit has limited *Austin* to its facts, see *United States* v. *McCullah*, 745 F.2d at 355-356, and it has recognized that the proper analysis of cumulative punishment issues is the analysis set forth by this Court in *Albernaz*, which is contrary to the Sixth Circuit's earlier approaches in both *Sutton* and *Austin*. See *United States* v. *Zackert*, 783 F.2d 677, 678-679 (6th Cir. 1986); *United States* v. *Metzger*, 778 F.2d 1195, 1210 (6th Cir. 1985).